

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DAVID S. AND ANN S.,
Petitioners,

v.

HON. GEOFFREY FERLAN,
JUDGE PRO TEMPORE OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

DEPARTMENT OF CHILD SAFETY;
S.S., THE MINOR; AND TINA H.,
Real Parties in Interest.

No. 2 CA-SA 2015-0072
Filed January 21, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED FOR PERSUASIVE AUTHORITY.
See Ariz. R. Sup. Ct. 111(a)(3), (c); Ariz. R. Civ. App. P. 28(a)(2);
Ariz. R. P. Spec. Actions 7(g), (i).

Special Action Proceeding from the Superior Court in Pima County
No. JD20140264

JURISDICTION ACCEPTED; RELIEF GRANTED

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COUNSEL

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By John C. Gilmore, Jr.
Counsel for Petitioners David S. and Ann S.

Mark Brnovich, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Real Party in Interest Department of Child Safety

Katie Rogers, PLLC, Tucson
By Katie Rogers
Counsel for Real Party in Interest Tina H.

DECISION ORDER

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this special action, petitioners David S. and Ann S., maternal great uncle and aunt of the minor, S.S., challenge the respondent judge's denial of their motion to stay the adoption of S.S. by real party in interest Tina H. The presiding judge of this panel of the court granted an initial stay of the impending adoption. The entire panel, now having had the opportunity to review this matter, accepts special-action jurisdiction because the order is interlocutory and petitioners have no "equally plain, speedy, and adequate remedy by appeal," Ariz. R. P. Spec. Actions 1(a); *see generally Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶¶ 8-9, 1 P.3d 155, 158 (App. 2000), and grants relief.

¶2 Petitioners, like the maternal grandfather, Patrick S., are intervenors in the related dependency proceeding and have appealed in that consolidated proceeding from the respondent judge's continued placement of S.S. with Tina H., the foster parent

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who seeks to adopt the child. *See David S. & Ann S. v. Dep't of Child Safety*, Nos. 2 CA-JV 2015-0170, 2 CA-JV 2015-0171 (consolidated). After a hearing, the respondent judge denied petitioners' motion to stay the anticipated adoption proceeding because an adoption petition had not yet been filed and petitioners lacked standing to seek the stay. After a second hearing, which took place after the adoption petition had been filed and apparently a hearing had been set, the respondent judge denied petitioners' request for greater intervention rights and denied the reasserted stay request, in which the Department of Child Safety (DCS) joined. This special action followed.

¶3 During an appellate stay conference on December 8, 2015, this court learned the adoption hearing was set for December 17, 2015. The presiding judge of this panel granted the petitioners' request for a stay of the adoption proceeding, pending this court's issuance of its mandate in petitioners' and the grandfather's appeals in the dependency proceeding.

¶4 Petitioners were permitted to intervene in the dependency proceeding insofar as placement was concerned, and, as parties aggrieved by the placement order, they were entitled to appeal it. *See* A.R.S. § 8-235(A); *see also Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, ¶ 7, 187 P.3d 1115, 1117 (App. 2008) (concluding "order awarding custody of a dependent child as well as a subsequent order ratifying or changing a child's placement is final and appealable"). But an adoption arguably could render any placement order moot. *See Sandblom v. Corbin*, 125 Ariz. 178, 182, 608 P.2d 317, 321 (App. 1980) (case becomes moot if outcome would have no "practical effect" on parties); *cf. Rita J.*, 196 Ariz. 512, ¶ 10, 1 P.3d at 158 (otherwise appealable order from permanency hearing essentially moot due to later order terminating parental rights). *But see Roberto F. v. Dep't of Child Safety*, 237 Ariz. 440, ¶¶ 5, 13-15, 352 P.3d 909, 910-12 (2015) (adoption does not render appeal from order terminating parent's rights moot). It is also unclear whether petitioners would have standing to seek to set aside an adoption should they be successful on appeal in the dependency proceeding. Even assuming *arguendo* petitioners had such standing, unlike reversal of a severance order, a successful appeal by petitioners, who

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are only potential placements, would not necessarily be a basis for setting aside an adoption. Additionally, as petitioners asserted below, if an adoption were granted, arguably they would not have the opportunity to request visitation. *See In re Pima Cty. Juv. Action No. B-9385*, 138 Ariz. 291, 293, 674 P.2d 845, 847 (1983) (adoption gives adopting parent right to exercise custody and control of child).

¶5 Thus, at the very least, petitioners had standing to seek a stay in order to avoid the possibility that although they may succeed on appeal, they may lack a practical remedy. *See In re Estate of Stewart*, 230 Ariz. 480, ¶ 8, 286 P.3d 1089, 1092 (App. 2012) (whether party has standing is issue of law we review de novo). Given their status as intervenors, they had standing to seek an order to protect their appeal from arguably being rendered meaningless.

¶6 Because they had such standing, we will not issue an advisory opinion as to the additional standing issues discussed above. *See In re Miguel R.*, 204 Ariz. 328, ¶ 20, 63 P.3d 1065, 1071 (App. 2003). And, to the extent petitioners are implicitly challenging the denial of their request to expand the scope of their intervention, we need not address that question. Because they did receive notice of the adoption, the expansion of the intervention to include the right to notice of the adoption is moot.

¶7 Moreover, as DCS argues in its response to the special-action petition, it had full party status in the dependency and an interest in the child's best interest for purposes of the adoption proceeding and the respondent judge could have and should have granted a stay on that ground. Counsel for the minor was also in favor of the stay, suggesting below it would be in the child's best interest and would be better for the child to resolve the appeal rather than "proceed with an adoption and potentially have to unwind that," which "would be very damaging to [S.S]."

¶8 Based on all of these circumstances, and in the interest of judicial economy, we grant relief, finding the respondent judge abused his discretion by denying the petitioners' requested stay on the ground that they lacked standing to request it, and we confirm our initial order staying that proceeding. *See Ariz. R. P. Spec.*

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Actions 3(c) (special-action relief appropriate when respondent judge abuses discretion); *see also Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982) (trial court abuses discretion if it commits error of law); *Karbal v. Ariz. Dep't of Revenue*, 215 Ariz. 114, ¶ 6, 158 P.3d 243, 245 (App. 2007) (standing is question of law).